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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Sacramento)

THE PEOPLE,

Plaintiff and Respondent,

v.

ABDULLAH MUHAMMAD,

Defendant and Appellant.

C042423

(Super. Ct. No.
01F04699)

Defendant Abdullah Muhammad was convicted after a jury trial of possession and possession for sale of both heroin and cocaine base (Health & Saf. Code, §§ 11350, subd. (a), 11351, 11351.5) and possession of a firearm by a convicted felon (Pen. Code, § 12021, subd. (a)(1)).¹ The trial court sentenced him to an aggregate term of 50 years to life in state prison.

¹ Undesignated statutory references are to the Penal Code.

Defendant appeals, contending the trial court erred in denying his motion for a new trial. We modify the judgment to award presentence conduct credits and otherwise affirm.

FACTUAL BACKGROUND

On June 12, 2001, Sacramento Police Department officers contacted defendant outside his apartment as part of an ongoing investigation. While conducting a search of defendant's person, officers found a magnetic "hide-a-key" box containing several individually packaged pieces of cocaine base totaling 5.34 grams and several individually packaged pieces of tar heroin totaling 3.17 grams. Each individually wrapped piece of cocaine and heroin weighed .2 grams and had a street value of \$20. Defendant also had \$1,175 in cash in his wallet.

In a search of defendant's residence, officers found a bag containing seven hypodermic syringes, two razor blades with a Brillo pad and a small wire to facilitate smoking rock cocaine, boxes of baggies, live .38-caliber ammunition, a digital scale with a white substance on it and six magnetic key holders (one of which contained white residue). Kelly Rambur, identified by defendant as his girlfriend, was in the apartment at the time of the search and admitted to smoking cocaine earlier that morning, but was not noticed by the officers to be under the influence of narcotics.

Officers also searched defendant's storage locker, which defendant visited at least twice a week. Officers found a black bag containing mail addressed to defendant, a locked safe and two other nylon bags. The safe was opened using a key obtained

from defendant. Inside the safe, officers found \$1,000 in cash, approximately \$26,000 in savings bonds and other paperwork. Inside one of the nylon bags, officers found a .357-caliber Ruger revolver, missing its barrel. The revolver would fire .38-caliber bullets. A maintenance person hired to clean apartments after tenants were evicted later found a gun barrel concealed in a flashlight while cleaning defendant's apartment.

While being taken to jail, defendant stated that he used heroin intravenously five times a day. Defendant was searched for track marks (injection sites) but none were found. Defendant's blood tested negative for the presence of heroin or cocaine.

Defendant testified that on the evening before his arrest, he picked Rambur up from jail and she spent the night at his apartment. He had known Rambur for two or three months and planned to marry her. She was homeless and a drug user, and defendant had helped her with clothes, food and shelter. Defendant claimed the drug paraphernalia in the apartment was Rambur's and that he had previously seen Rambur with a "hide-a-key" box. Defendant had lied to the officers about using drugs in an attempt to "cover" for Rambur and because he was told he would just be placed in a drug treatment program. He also denied that he had a "hide-a-key" box in his pocket when the officer searched him.

Defendant's only employment was occasional odd jobs. He explained that the reason he had \$1,175 in cash when he was arrested was because he and Rambur had intended to marry that

day. He said he had taken a cash advance on his credit card to obtain some of the cash and took the rest from the storage locker. The money and savings bonds found in the storage unit were from his \$770 monthly Social Security payments, as well as from playing the Canadian and Australian lotteries. He had also been "economizing" his finances in anticipation of his upcoming marriage.

According to defendant, the digital scale found in his apartment was for weighing overseas mail. The gun found in the storage unit belonged to a homeless man named George, whom defendant had allowed to stay in the apartment for a few months. Defendant had told George that, as an ex-felon, he did not want the gun in the house. George accompanied defendant to the storage locker on a few occasions. After George moved out, defendant saw some ammunition lying around the house.

Defendant admitted that he had prior convictions for attempted murder, assault, and two robberies. Defendant also admitted to a series of lies, including lies to the officers that he used and injected drugs, lies to the nurse at the jail about his fitness for incarceration and his heroin injections, and lying to the jury about not being familiar with using a handgun when, in fact, he had used one in the commission of one of his prior crimes.

PROCEDURAL BACKGROUND

At the conclusion of the defense case-in-chief, both parties moved their exhibits into evidence subject to review off the record. Thereafter, all of the People's exhibits 1 through

58 were admitted except an audio cassette and transcript (exhibits 41 and 41A), and the following items that were inside the black bag recovered from defendant's storage unit (exhibit 18): two bundles of mail addressed to defendant (exhibits 18H and 18K), an envelope containing prize information (exhibit 18L), a legal size envelope addressed to defendant (exhibit 18M), and a large white envelope addressed to defendant (exhibit 18N). Defendant's passport (exhibit 18J) and eight bundles of mail addressed to defendant contained inside the black bag (exhibits 18A through 18G and exhibit 18I) were admitted into evidence.

Jury deliberations commenced immediately before the evening recess on May 28, 2002. On May 29, 2002, it came to the court's attention that one of the jurors had spoken with her husband about the case and possibly relayed information back to the panel. Defense counsel requested a mistrial due to jury misconduct. The following day, while the court was questioning the jurors on this issue, one of the jurors mentioned that the jury had "talked about the Swiss accounts and stuff like that" from the evidence that they saw. Before the court spoke with the next juror, defense counsel noted that it was "interesting" that the jury had been discussing the Swiss accounts because he thought they had excluded, or "pulled out," all the evidence regarding the Swiss accounts. The trial court then commented that, although there had been an effort to exclude those, apparently there was some reference to the Swiss accounts in the evidence the jury received.

The juror who had spoken to her husband was dismissed for misconduct; the jury was reconstituted and began deliberations anew. The jury returned its verdicts the following day, finding defendant guilty on all charges.

On July 11, 2002, defendant substituted new retained counsel in anticipation of filing a motion for new trial. The trial court authorized release of personal juror identification information to assist counsel in preparing the motion. Defendant moved for a new trial based on the jury viewing documents relating to defendant's Swiss bank accounts. The trial court denied the motion.

DISCUSSION

I

Motion for New Trial

Defendant contends the trial court erroneously denied his motion for a new trial because there had been a stipulation that evidence of defendant's overseas bank accounts would not be admitted. Therefore, he argues, his motion should have been granted on the grounds of prosecutorial misconduct and because the jury viewed out-of-court documents. Defendant's contention is unsupported by the record.

Defendant bases his claim of prosecutorial misconduct on his assertion that there was a stipulation at trial that documents pertaining to defendant's overseas bank accounts would be excluded from evidence and that defendant would not be permitted to testify regarding those bank accounts. From this premise, he asserts that, although the prosecutor never

commented on the existence of the bank accounts, he "was a party," however innocently, to the jurors receiving the evidence, because the offending documents were part of the People's exhibits. Thus, he argues, the prosecutor's "mistake" rises to the level of "misconduct" from which prejudice is presumed. Defendant's premise fails.

In reviewing a trial court's resolution of a motion for a new trial, we will exercise our independent judgment on questions of law; but all presumptions favor the trial court's exercise of its power to judge the credibility of witnesses, resolve any conflicts in testimony, weigh the evidence, and draw factual inferences. (*People v. Taylor* (1984) 162 Cal.App.3d 720, 724-725.) Deference to the trial court's fact finding means, of course, that we will not reject the court's express or implied findings if they are supported by substantial evidence. (*People v. Drake* (1992) 6 Cal.App.4th 92, 97; *People v. Taylor*, *supra*, at p. 724.)

Defendant's appellate argument is based largely on his trial counsel's declaration in support of the new trial motion. However, consistent with the standards of appellate review, we must view the record in a light most favorable to the decision of the trial court. Thus, we will adopt the trial court's view of the facts to the extent that view is supported by the evidence. In this light, defendant's essential premise, that there was a stipulation at trial that all documents pertaining to defendant's overseas bank accounts would be excluded from evidence, must be disregarded.

Defendant's trial counsel filed a declaration in support of the motion for new trial stating there had been a mid-trial "stipulation" about the exclusion of evidence of defendant's overseas bank accounts and then explained: "At the conclusion of trial, I personally went through a pile of documents which were offered into evidence by the prosecution and removed those which made reference to the above-described bank accounts. The prosecutor was present and observed while I went through these documents. The documents purged of the reference to the bank accounts were then given to the clerk."

The record, however, contains no objection to any admitted exhibit, no stipulation regarding the admissibility of certain categories of evidence, no discussion during trial about documents referring to overseas bank accounts and no agreement that certain exhibits would be withdrawn. The only discussion during trial contained in the record relating to the admission of exhibits was the parties' motions to move their exhibits into evidence subject to review off the record.

Moreover, the trial court specifically found that no such agreement or stipulation had been entered. At the hearing on defendant's motion for new trial, the court stated:

"I looked in the motion and the reply memorandum, and I read [defense counsel's] declaration. And I think it should be clear that, with respect to the documents that are at issue in this motion, there was never a stipulation by the parties that overseas bank accounts were inadmissible.

"The way this matter was brought before the Court was that [the prosecutor], on behalf of the People, offered a rather large block of documents as an exhibit.

"[Defense counsel], on behalf of [defendant], indicated that he felt that some of the documents contained in this voluminous stack of documents that were in a black duffle bag were objectionable, and I invited [defense counsel] to review the documents and to identify specifically what documents he felt were objectionable, in response to the People's offer of these items into evidence.

"Whereupon it was agreed by the Court and counsel that [the prosecutor] and [defense counsel] would review the documents. [Defense counsel] would identify those documents which they felt were objectionable, and if [the prosecutor] was so inclined, he would voluntarily withdraw the documents that [defense counsel] objected to.

"If [the prosecutor] was unwilling to withdraw a document that [defense counsel] objected to, the Court would then rule on its admissibility.

"Counsel, thereupon, completed their review of the documents, and [defense counsel] identified those documents, which he deemed objectionable. The majority which I believe were in fact Swiss bank accounts. And [the prosecutor] withdrew his offer as to those documents, and they were not placed in evidence. They were placed in a separate envelope and marked as such.

"The balance of the documents were left in the black duffel bag. They were admitted into evidence, and they were then provided to the jury. But the documents that [defense counsel] objected to were withdrawn and not provided to the jury. So the only documents that were given to the jury were documents that were in fact admitted into evidence. And there was no mistake that was made by giving the jury documents which had already been objected to or withdrawn. And that's the manner in which those documents were given to the jury.

"It does appear that in those documents were some Swiss bank account records, and I believe that's the correct state of the record. So when [defense counsel] says this in his declaration in support of the reply memorandum, and I quote, he says on page 9, line 2, 'For some reason the jurors had been inadvertently given documents excluded by our stipulation,' there was no stipulation to exclude documents, or that specific documents be excluded. There was an agreement between counsel, pursuant to [defense counsel's] objection that specific documents would be excluded, and those documents were in fact excluded."

We accept the trial court's view of the facts, as it is consistent with the record at trial, that there was no stipulation to exclude documents that were then provided to the jury nor any violation by the prosecutor of an agreement between counsel.

Likewise, defendant's contention that his new trial motion should have been granted pursuant to section 1181² because when the jury viewed documents relating to defendant's overseas accounts, they reviewed "out of court" documents, is unsupported by the record.

There is absolutely nothing in the record to support defendant's contention that the jury reviewed documents that had been excluded from evidence. As set forth above, the trial court expressly found that " . . . the only documents that were given to the jury were documents that were in fact admitted into evidence. And there was no mistake that was made by giving the jury documents which had already been objected to or withdrawn." The trial court found that the documents the parties agreed to exclude were, in fact, excluded from evidence. Even defendant's trial counsel stated in his declaration that the documents he removed from the duffle bag were given to the clerk.

Defendant has shown no abuse of discretion in the denial of his new trial motion. (See *People v. Delgado* (1993) 5 Cal.4th 312, 328.)

II

Presentence Conduct Credits

At sentencing, the clerk informed the trial court that defendant had served a total time of 485 days in custody. The

² Section 1181, subdivision 2, authorizes the grant of a new trial "[w]hen the jury has received any evidence out of court, other than that resulting from a view of the premises, or of personal property."

trial court started to award defendant a total of 727 days of presentence custody credit (apparently comprised of 485 days actual time and 242 days conduct credit) when the prosecutor interjected, "There are no credits on the indeterminate sentence. It's 50 calendar years." The trial court responded, "Right. The credit would not be set against the indeterminate sentence, only against --," and proceeded to move on to imposition of restitution. No further comments or discussion of custody credit occurred and the abstract of judgment reflects an award of only the 485 days defendant actually spent in custody.

As we shall explain, a defendant with a nonviolent third strike, sentenced to indeterminate terms, may receive presentence conduct credits. Thus, we find defendant was improperly deprived of his 242 days of presentence conduct credits.

Section 4019 is the general statute governing credit for presentence custody.³ Absent contrary authority, "a defendant

³ Section 4019, subdivision (a)(4), states: "The provisions of this section shall apply . . . [¶] (4) [w]hen a prisoner is confined in a county jail . . . following arrest and prior to the imposition of sentence for a felony conviction."

Subdivision (b) provides that "for each six-day period in which a prisoner is confined in or committed to a [county jail], one day shall be deducted from his or her period of confinement unless it appears by the record that the prisoner has refused to satisfactorily perform labor as assigned"

Subdivision (c) provides that "[f]or each six-day period in which a prisoner is confined in or committed to a [county jail], one day shall be deducted from his or her period of confinement unless it appears by the record that the prisoner has not

receives what are commonly known as conduct credits toward his term of imprisonment for good behavior and willingness to work during time served prior to commencement of sentence.

(§§ 2900.5, 4019; *People v. Sage* (1980) 26 Cal.3d 498, 501-[502].)" (*People v. Thomas* (1999) 21 Cal.4th 1122, 1125 (*Thomas*).)

The *Thomas* court, 21 Cal.4th at page 1130, held that presentence conduct credits pursuant to section 4019 are properly awarded where the current convictions are not "violent" within the meaning of section 667.5, subdivision (c), and defendant did not have solely an indeterminate sentence. In such a situation "sections 2933.1 and 667.5(c)(7) limit a defendant's presentence conduct credit to a maximum of 15 percent only when the defendant's current conviction is itself punishable by life imprisonment, not when it is so punishable solely due to his status as a recidivist." In *Thomas*, defendant's presentence conduct credits did not exceed his determinate term, so the *Thomas* court noted in footnote 3, "we are not asked in this case to decide whether a three strikes defendant is entitled to presentence conduct credits when [as in

satisfactorily complied with the reasonable rules and regulations established"

Penal Code section 4019, subdivision (e), provides: "No deduction may be made under this section unless the person is committed for a period of six days or longer." Penal Code section 4019, subdivision (f), provides: "It is the intent of the Legislature that if all days are earned under this section, a term of six days will be deemed to have been served for every four days spent in actual custody."

the case at bench] he has solely an indeterminate sentence. (See § 699; *People v. Henson* [(1997)] 57 Cal.App.4th [1380,] 1390, fn. 10; *People v. Stofle* (1996) 45 Cal.App.4th 417, 421 [].)" (*Thomas, supra*, 21 Cal.4th at p. 1130.)

In *People v. Buckhalter* (2001) 26 Cal.4th 20, 32, our Supreme Court described its decision in *Thomas* as holding that "restrictions on the rights of Three Strikes prisoners to earn term-shortening credits do not apply to confinement in a local facility prior to sentencing. We emphasized that when limiting the credit rights of offenders sentenced thereunder, the Three Strikes law (§§ 667, subd. (c)(5), 1170.12, subd. (a)(5)) expressly refers only to 'postsentence . . . credits,' i.e., those '"awarded pursuant to [a]rticle 2.5.'" (*People v. Thomas* (1999) 21 Cal.4th 1122, 1125 []), and 'does not address presentence . . . credits' for Three Strikes defendants [citation]." (Italics omitted.)

Thus, in this case, where the third strike offense is not "violent," the statutory framework does not preclude presentence conduct credits. Moreover, defendant receives the entire benefit of section 4019, subdivision (c) and is not subject to the 15 percent limit to his presentence credits by virtue of the indeterminate terms imposed. "Section 2933.1(c) generally limits presentence credits to 15 percent of actual time served when a defendant . . . is convicted of a violent felony listed in section 667.5, subdivision (c)." (*People v. Daniels* (2003) 106 Cal.App.4th 736, 739; accord *People v. Hawkins* (2003) 108 Cal.App.4th 527, 531-532.) Defendant was not convicted of a

crime listed in section 667.5, subdivision (c), and therefore is not bound by the 15 percent limit in section 2933.1. (See *People v. Thomas, supra*, 21 Cal.4th at p. 1130 ["We therefore conclude sections 2933.1 and 667.5(c)(7) limit a defendant's presentence conduct credit to a maximum of 15 percent only when the defendant's *current conviction* is itself punishable by life imprisonment, not when it is so punishable solely due to his status as a recidivist. Because defendant's current convictions are not 'violent' within the meaning of section 667.5, subdivision (c), the trial court properly awarded him presentence conduct credits under section 4019 rather than section 2933.1"], fn. omitted; italics added.)

When section 4019 applies, a defendant's presentence good-time/work-time credit is calculated by dividing the days of actual custody by four, discounting any remainder, and multiplying the whole-number quotient by two. (*People v. Culp* (2002) 100 Cal.App.4th 1278, 1282.) Those credits are then added to the number of actual presentence days spent in custody, to arrive at the total number of presentence custody credits. (*Ibid.*)

Applying this formula, defendant is entitled to an additional 242 days of conduct credit. In the interest of judicial economy, we will modify the judgment to correct this error without first requesting supplemental briefing. A party wishing to address the issue may petition for rehearing. (Gov. Code, § 68081.)

DISPOSITION

The judgment is modified to reflect that appellant has 727 days of presentence credits, consisting of 485 days actual custody and 242 days conduct credits. As modified, the judgment is affirmed. The trial court is ordered to prepare an amended abstract of judgment and to forward a certified copy to the Department of Corrections.

BLEASE, Acting P. J.

We concur:

HULL, J.

ROBIE, J.